

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

BECKLEY DIVISION

MIACHEL HICKS and
BRENDA HICKS,

Plaintiffs,

v.

CIVIL ACTION NO. 5:00-0448

CHARLES NUGENT HERBERT, JR.,

Defendant.

MEMORANDUM OPINION AND ORDER

Pending are Plaintiffs' motions to remand and to stay this action until the Court rules on the remand motion. The Court **DENIES** the motion to remand. The motion to stay is **DENIED** as moot.

I. FACTUAL AND PROCEDURAL BACKGROUND

This civil action, originally filed in the Circuit Court of Raleigh County, West Virginia concerns an automobile accident in that county on May 5, 1998 in which Plaintiff Miachel Hicks was injured. His wife claims loss of consortium. The Hickses are West Virginia residents; Herbert is a Virginia resident. The *ad damnum* clause of the complaint demands "compensatory and punitive damages in the sum of \$70,000" as well as "[s]uch other and further relief as may be just and proper." Defendants removed based on diversity jurisdiction. Plaintiffs moved for remand, arguing the amount in controversy does not exceed the statutory requirement of \$75,000. Plaintiffs also offer to certify to the Court, pursuant to Adkins v. Gibson, 906 F. Supp. 345 (S.D.W. Va. 1995) (Haden, C.J.), that

the amount in controversy does not exceed the jurisdictional threshold.

II. DISCUSSION

District courts have original jurisdiction of all "civil actions where the matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs, and is between citizens of different States." 28 U.S.C. § 1332(a)(1). Defendants may remove any case of which the district courts have original jurisdiction. 28 U.S.C. § 1441(a). Removal statutes must be construed strictly against removal. See Mulcahey v. Columbia Organic Chem. Co., Inc., 29 F.3d 148, 151 (4th Cir. 1994). The party seeking to remove a case to federal court has the burden of establishing federal jurisdiction. See id. If federal jurisdiction is doubtful, a remand is necessary. See id.

A respected commentary states, "the [preferred] practice is to treat the amount requested by the plaintiff in the state court as the amount in controversy." 14C Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 3d § 3725 at 98 (1998). However, the treatise notes this result is fully satisfactory only in states where recovery is not limited to the amount demanded. Id. In West Virginia, a plaintiff is not bound by the *ad damnum* clause and may seek to amend it after final judgment to conform to the evidence. See Adkins, 906 F. Supp. at 348.

This Court has previously found that a request for punitive damages, where properly recoverable, inevitably inflates a plaintiff's potential recovery. See Chiartas v. Bavarian Motor

Works, AG, __ F. Supp.2d __, 2000 WL 1091467 (S.D.W. Va. 2000) (citing Weddington v. Ford Motor Credit Co., 59 F. Supp. 2d 578, 584 (S.D.W. Va. 1999)); see also Cline v. Matney, 20 F. Supp. 2d 977 (S.D.W. Va. 1998). A good faith claim for punitive damages may augment compensatory damages in determining the amount in controversy unless it can be said to a legal certainty that plaintiff cannot recover punitive damages in the action. See White v. J.C. Penney Life Ins. Co., 861 F. Supp. 25, 27 (S.D.W. Va. 1994) (citing Bell v. Preferred Life Assurance Soc'y, 320 U.S. 238 (1943)).

Under West Virginia law, punitive damages are recoverable in tort actions, "where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear[.]" Smith v. Perry, syl. pt. 1, 178 W. Va. 395, 397, 359 S.E.2d 624, 625 (1987). West Virginia courts have upheld punitive damage awards substantially in excess of compensatory damages recovered. See TXO Prod. Corp. v. Alliance Resources Group, 187 W. Va. 457, 419 S.E.2d 870 (1992), aff'd, 509 U.S. 443 (1993). Plaintiffs' complaint alleges Defendant acted in reckless disregard for the safety and lives of others. (See Compl. ¶¶ 8, 10.) Thus, punitive damages, presumably asserted in good faith, are potentially recoverable in this action.

Plaintiffs' attempted certification of the amount in controversy based on Adkins is also unavailing. In Adkins, the Court ultimately relied upon plaintiff's binding representation to

the Court that the amount in controversy was less than the jurisdictional limit. 906 F. Supp. at 348. However, in Adkins the plaintiff did not seek punitive damages. As the Court has since adjudged, a claim for punitive damages distinguishes a case from Adkins, and alters the amount in controversy calculation. See Cline, 20 F. Supp. 2d at 979.

Additionally, because under West Virginia law Plaintiffs' recovery is theoretically unlimited, only a binding stipulation that they would not seek nor accept more than \$75,000 could limit the potential recovery. Some authority additionally suggests such a waiver must be truly binding on the plaintiff in state court before it will prevent removal. See Wright & Miller, supra, §3725 at 87. At any rate, no such binding waiver is offered here.

III. CONCLUSION

Accordingly, the Court **DENIES** Plaintiffs' motion for remand. The motion to stay is **DENIED** as moot.

The Clerk is directed to send a copy of this Memorandum Opinion and Order to counsel of record and to publish it on the Court's website, <http://www.wvsc.uscourts.gov>

ENTER: August 17, 2000

Charles H. Haden II, Chief Judge

Philip J. Combs
Allen, Guthrie & McHugh
Charleston, W. Va.
for Plaintiffs

Brent K. Kesner
Sabrena A. Olive
Kesner, Kesner & Bramble
Charleston, W. Va.
for Defendant